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Earned citizenship – understanding Union citizenship through its scope

(Paper forthcoming in D Kochenov (ed) EU Citizenship and Federalism: the Role of Rights, CUP 2015)

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In a contribution written several years ago,¹ I pleaded for a more consistent interpretation of the Treaty Union citizenship provisions: I argued that the personal scope of the Treaty should be defined, in relation to Union citizenship, having regard to Article 20(1) TFEU alone, so that any citizen of the Union would fall within the scope of Union law regardless of migration and/or wealth. As for the material scope of the Treaty, I included in the rights granted to Union citizens not only the standard migratory rights to which we had already grown accustomed in 40 years of internal market case law, but also the right to equal treatment provided for by Article 18 TFEU. This in my opinion would allow static Union citizens who find themselves in a situation comparable to that of migrant Union citizens, to claim the same rights by virtue of the general principle of equality. This is important because any meaningful notion of citizenship must guarantee equality of treatment of its beneficiaries (regardless of wealth or other criteria).²

Six years down the line, I can comfortably note that this is not the path that has been followed by the Court; rather, in order to fall within the scope of the Treaty the citizen must also fall within its material scope, so that a migratory element remains necessary. However, the Court has also held that the fact that the Union citizen has not exercised her right to free movement does not necessarily mean that the situation is purely internal. This is so for two reasons: first of all, a national rule might have a deterrent effect so that it might discourage or disadvantage the citizen's right to move at a later stage (*Garcia Avello*).³ Secondly, the national rule might affect the 'substance of the citizenship rights' (*Rottmann/Ruiz Zambrano*),⁴ in particular (but not only) when, as a result of the operation of the national rule, the Union citizen would have to leave the territory of the Union.

These two qualifications to the migratory rule raise a wealth of questions: practically, it is very difficult to foresee when and if the Treaty applies; this is so because the Court increasingly relies on subjective presumptions (such as whether a minor would or nor follow her father outside of the EU): being subjective such presumptions cannot apply in a predictable way. To use the words of Advocate General Sharpston 'Lottery rather than logic

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¹ E Spaventa 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 CMLRev 13.

² For an interesting discussion about equality in the Union citizenship context see D Kochenov 'Equality across the legal orders; or voiding EU citizenship of content' in E Guild, CJ Gortázar Rotaecche and D Kostakopoulou (eds) *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014), 301.

³ Case C-148/02 *Garcia Avello* [2003] ECR I-1613.

⁴ Case C-135/08 *Rottmann* [2010] ECR I-1449; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; in contrast to other authors I see *Rottmann* and *Ruiz Zambrano* as part of the same line of case law, where Union citizenship, at least in theory might assume a significance of itself (regardless of migration); in this respect see also the rather more convoluted Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

would seem to be governing the exercise of EU citizenship rights'.⁵ Theoretically, it is also very difficult to understand what Union citizenship is, or is 'destined' to be: recent case law has not only departed from the fundamental status rhetoric, but also, and more fundamentally, seems to be re-allocating responsibility for the vulnerable Union citizen (solely) with the State of origin. And overall, Union citizenship rests on a paradox: it is at the same time severed from the State but entirely dependent upon the nation state; it is additional to national citizenship, and yet it is antagonistic to that very concept. From the viewpoint of the citizen, on the other hand, the dichotomy status/beneficiary, i.e. the fact that holding the status of EU citizen does not automatically confer rights, means that Union citizenship is increasingly seen in diminutive terms, subtracting resources from national welfare societies;⁶ rather than in positive terms, adding to the personal legal heritage of each citizen. Rather than enriching its beneficiaries, it is seen as impoverishing them.

In this contribution I will argue that we are witnessing a reactionary phase in the Court's interpretation of the citizenship provisions which not only reaffirms the migration paradigm, but also contracts the scope of application of Article 20(1) TFEU, as well as imposing additional criteria for the enjoyment of citizenship rights to those provided for in Directive 2004/38.⁷ In turn, this development in the case law has important repercussions on the way we think about Union citizenship – in particular, the dichotomy status/beneficiary, together with the additional requirements imposed by the Court and the reallocation of responsibility of vulnerable citizens across national boundaries, not only reduce the relevance of Union citizenship, but transform it from a fundamental status to a mere *additional* one, so that the significance of Union citizenship is much reduced. Whilst this turn in the case law can be defended from a hermeneutic perspective, it has important consequences. First, it restates the primacy of the market citizen; secondly, and more importantly, Union citizenship far from being a uniting concept becomes a vehicle for further discrimination. In this writer's perspective it becomes near impossible to defend the concept of Union citizenship so interpreted: no citizenship at all is preferable to such an unequal citizenship.

In order to illustrate my claim I will recall the more recent case law on the scope of application of Union citizenship. I will then briefly analyse the significance of the 'substance of rights' case law, to then turn to a critique of the Court's approach.

1. From the market to the market: the (ir)relevance of the inactive citizen

When we think about Union citizenship and what it means, we can identify, generalising somewhat, four periods – the 'market citizen' phase; a constituent phase; a consolidation phase; and a reactionary phase.

The market citizen phase, which predates the introduction of Union citizenship in the Maastricht Treaty, is characterised by a broad interpretation of the economic migrant's rights where the Court (and the legislature) protect migrants beyond their role as economic actors:

⁵ AG Sharpston's Opinion Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, para 88.

⁶ On the dichotomy status/belonging see generally C Margiotta *Cittadinanza Europea. Istruzioni per l'uso* (Laterza 2014).

⁷ On these issues see also the Chapter by N Nic Shuibhne below.

take for instance the case law on access to social and tax advantages;⁸ on family and education rights;⁹ on the rights of the returning migrant.¹⁰ The extensive interpretation of the Treaty economic migration provisions have thus been identified as a form of citizenship in pectore.¹¹ The market-citizen became less relevant during the constituent and consolidation phases (see below) since in those years the Court, and the institutions, shifted their rhetoric towards the ‘citizen’; it is becoming again prominent and, I would argue, it is the most tangible element of a social space within the integrated EU market.¹²

The constituent phase follows from the innovations in the Maastricht Treaty; in this period the Court pursued an ambitious vision of the nature and significance of Union citizenship. Here think about the foundational citizenship cases – *Martínez Sala*,¹³ *Grzelczyk*,¹⁴ *D’Hoop*,¹⁵ *Baumbast*,¹⁶ *MRAX*,¹⁷ and *Bidar*¹⁸ where there is a conscious attempt to free citizenship (and the integration project) from its market roots. This case law is characterised by an expansion of the rights of Union citizens beyond those explicitly conferred by secondary legislation; in particular, the Court demanded that public authorities took into due consideration the personal circumstances of the claimants, thus putting ‘the’ *individual*, that particular claimant rather than the migrant generally, at the centre of their assessment.¹⁹

⁸ E.g. Case 32/75 *Cristini v SNCF* [1975] ECR 1985; Case 59/85 *Reed* [1986] ECR 1283.

⁹ E.g. Case 76/72 *Michael S* [1973] ECR 457; Case 9/74 [1974] *Echternacht* ECR 773; Case C-7/94 *Lubor Gaal* [1995] ECR I-1031.

¹⁰ E.g. Case C-370/90 *Singh* [1992] ECR I-4265; I would add to those also those cases, like Case C-60/00 *Carpenter* [2002] ECR I-6279, where a very broad interpretation of the scope of the Treaty allows the Court to intervene to protect fundamental rights.

¹¹ See e.g. E. Meehan, *Citizenship and the European Community* (Sage, 1993).

¹² This is not to say that the Court’s interpretation is no longer generous; rather that the Court is confident in providing an extensive interpretation of the rights of economically active people in a way that it is no longer in relation to those who cannot establish any market credentials (e.g. Case C-244/12 *Ogieriachi*, judgment of 10 July 2014, nyr, and compare with Case C-378/12 *Onuekwere*, judgment of 16 January 2014, nyr, para 23; Case C-507/12 *Saint Prix*, judgment of 19 June 2014, nyr; Case C-140/12 *Brey*, judgment of 19 September 2013, nyr).

¹³ Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

¹⁴ Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

¹⁵ Case C-224/98 *M N D’Hoop v Office national d’emploi* [2002] ECR I-6191.

¹⁶ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

¹⁷ Case C-459/99 *Mouvement contre le racisme, l’antisémitisme et la xénophobie ASBL (MRAX) v Etat Belge* [2002] ECR I-6630.

¹⁸ Case C-209/03 *Bidar* [2005] ECR I-2119.

¹⁹ This focus on the individual is not without its problems (and it is partly inevitable in the light of the preliminary ruling structure); in particular, it risks sacrificing collective interests and ideas of co-operative societies in favour of a more individualistic (and some would say neo-liberal) model; an example of this might be found in the rulings in Case C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; on these issues see E Spaventa ‘Individual v Collective Rights in the EU’, paper presented at a workshop held at the EUI February 2012; and JHH Weiler ‘On the Distinction between Values and Virtues in the Process of European Integration’ (<http://www.iilj.org/courses/documents/2010Colloquium.Weiler.pdf>). For a more general and intellectually challenging analysis of individualism in capitalist societies see P Verhaeghe *What About Me? The Struggle for Identity in a Market-Based Society* (Scribe 2014). Furthermore, the case by case assessment demanded by the Court is also constitutionally challenging; see e.g. M Dougan, ‘The Constitutional dimension to the case law on Union citizenship’ (2006) 31 ELRev 613; E Spaventa ‘The Constitutional Effect of Union Citizenship’ in U Neergaard, R Nielsen, L Roseberry (eds) *The Role of the Courts in Developing a European Social Model - Theoretical and Methodological Perspective* (2010 Copenhagen DOJ publishing).

The consolidation phase is characterised by the codification of the case law of the Court in Directive 2004/38.²⁰ Here we see the fine-tuning of the case law (*Trojani*, *Förster*²¹) as well as the development of new important strands of citizenship cases (e.g. exportability of grants,²² derived rights of TCNs parents²³). Overall, in this phase, which is by no means homogenous, we see two emerging trends. On the one hand, the Court seems ready to accept the consequences of Directive 2004/38: an updated instrument incorporating all of the case law of the Court, including the principle of proportionality, moves the ‘battleground’ of citizenship to the interpretation of these provisions. The trade-off is clear: the case by case assessment – unworkable for either Court or administrators – is left behind in favour of more predictable rights for economically inactive people.²⁴ On the other hand, and at the same time, in relation to the economic free movement provisions the Court refuses the possibility that Directive 2004/38 might act as a straightjacket to its interpretation of the Treaty provisions; much as it was the case before the Directive was adopted, the purposive interpretation of the Treaty rights is unaffected by codification (e.g. *Vatsouras*;²⁵ *Saint Prix*,²⁶ but also the rights of students as important agents of economic and social integration). As said above, in this way, the centrality of the market citizen is restated.

The reactionary phase – which we are witnessing at present – is characterised by an apparent retreat from the Court’s original vision of citizenship in favour of a minimalist interpretation,²⁷ which reaffirms the centrality of the national link of belonging, positing the responsibility for the most vulnerable individuals in society firmly with the state of origin. In this way, the promise of Union citizenship – as a status which ‘exploded’²⁸ the traditional links of belonging, pre-assigned rather than chosen, in favour of a more fluid concept where belonging is determined also having regard to the actual links established by the (individual) citizen with the polity of reference – is much reduced if not altogether nullified. Beside workers, and economically active citizens, the ‘fundamental status’ is to be enjoyed only by mobile, healthy and wealthy migrants. In all fairness, this retreat is better understood also having regard to the economic crisis that has plagued the EU since the late 00s.²⁹ It is in this context that discussions about intra-European solidarity come to occupy the public debate:

²⁰ Directive 2004/38 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (hereinafter Directive 2004/38).

²¹ Case C-456/02 *Trojani* [2004] ECR I-7573; Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

²² E.g. Case C-523/11 *Prinz*, judgment of 18 July 2013, nyr; C-220/12 *Meneses*, judgment of 24 October 2013, nyr; C-275/12 *Elrick*, judgment of 24 October 2013, nyr.

²³ E.g. Case C-529/11 *Alarape and Tijani*, judgment of 8 May 2013, nyr.

²⁴ See explicitly Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507, esp para 57 and ff; see also e.g. Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, judgment of 12 March 2014, nyr and compare with Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G*, judgment of 12 March 2014, nyr.

²⁵ Joined Cases C-22 and C-23/08 *Vatsouras and Koupantantz* [2009] ECR I-4585.

²⁶ Case C-57/12 *Saint-Prix*, judgment of 19 June 2014, nyr.

²⁷ But some authors have been fiercely critical of the case law of the Court believing it to be too integrationist, see e.g. G Davies ‘The humiliation of the state as a constitutional tactic’ in F Amtenbrink and P A J van den Berg *The Constitutional Integrity of the European Union* (Asser Press, 2010), 147.

²⁸ S O’Leary ‘Putting Flesh on the Bones of European Union Citizenship’ (1999) 24 ELRev 68.

²⁹ For a stimulating analysis of the financial crisis see e.g. A J Menéndez, *The Existential Crisis of the European Union*, 14 German Law Journal (2013), <http://www.germanlawjournal.com/index.php?pageID=11&artID=1520>.

first in relation to the sovereign debt crisis; and then in relation to (the evils of) migration,³⁰ and the demands (real or imagined) imposed by said migration on the national welfare systems,³¹ already stretched by the recession. The political appetite for a citizens' Europe is thus grossly reduced and – intentionally or not – the Court seems not immune to this change of mood.

The rest of this contribution will focus on an analysis of this more recent phase in the case law. In particular, I will look at two different strands of case law: the 'substance of the rights' case law; and those cases in which the Court imposed additional criteria to be satisfied by Union citizens in order to benefit from the protection conferred by Directive 2004/38 (and indirectly by the Treaty itself). My overall claim is that the contraction in the scope of Union citizenship is far from being a federalising move; rather, it determines a centralising effect whilst at the same time also denying rights to the great majority of Union citizens.

2. Ruiz Zambrano and the substance of the rights test – a hasty retreat and a problematic doctrine

It has been mentioned above that the Union citizenship provisions remain slaves to the internal market orthodoxy so that, in order to enjoy the protection of the Treaty, a Union citizen needs to establish cross-border credentials. The Court has, however, also stated that the absence of migration does not, in itself, mean that a situation is confined to the territory of a single Member State and is of no relevance to the Treaty. So, the theory goes, a situation is not purely internal if the claimant can argue that the application of a given rule is capable of imposing an obstacle on her future ability to move (*Garcia Avello*).³² However, whilst in the case of the economic free movement provisions it seems very easy to satisfy the cross-border/potential-movement requirement,³³ in the case of Union citizenship this might no longer be the case. In *Iida*, for example, the Court clarified that the purely hypothetical prospect that the right to move might be obstructed does not establish a sufficient connection with EU law.³⁴ Given that in *Garcia Avello* the claimants had not moved, were not intending to move in the near future, and had no plans to move in the distant future, it is difficult to determine the degree of proximity required between rule and obstacle before the Treaty is

³⁰ See e.g. D Cameron, Letter to the *Financial Times*, 26 November 2013; on the same lines Mr Cameron's letter to the *The Daily Telegraph*, 15 March 2014; 'German Conservatives stir up 'welfare tourism' row', *EUobserver.com* 4 December 2013; 'Merkel considers restrictions on unemployed EU migrants' *Financial Times*, 26 March 2014; 'EU Migration. The Gates are open' *The Economist*, 4 January 2014; Belgium sends 'burden' EU citizens letters asking them to leave the country' *EUobserver.com*, 30 January 2014.

³¹ See L Andor (Commissioner for Employment, Social Affairs and Inclusion) 'Labour Mobility in the EU – The Inconvenient Truth', Lecture at the University of Bristol delivered on 10 February 2014, Speech /14/115, available on http://europa.eu/rapid/press-release_SPEECH-14-115_en.htm.

³² Case C-148/02 *Garcia Avello* [2003] ECR I-1613.

³³ Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-405/98 *Gourmet International (GIP)* [2001] ECR I-1795; Case C-355/00 *Freskot* [2003] ECR I-5263.

³⁴ In Case C-40/11 *Iida*, judgment of 8 November 2012, nyr, esp para 77; for an analysis of *Iida* see S Reynolds 'Exploring the 'intrinsic connection' between free movement and the genuine enjoyment test: reflections of EU citizenship after *Iida*' (2013) 38 *ELRev* 376.

engaged.³⁵ In any event, in those cases a migratory element, however speculative, is – at least in theory – present.

Secondly, the situation is not purely internal if the rule affects the *genuine enjoyment of the substance of the rights* conferred by the Union citizenship provisions. This would be the case when the Member State seeks to deprive the Union citizen of her nationality (*Rottmann*);³⁶ or where the rules might mean that the Union citizen has little choice but to leave the territory of the European Union altogether (*Ruiz Zambrano*).³⁷ It is in relation to the substance of rights doctrine that there is some scope for the application of the Treaty to situations which are truly confined to one single Member State; and, it is in relation to this doctrine that we have to assess whether Union citizenship has had the effect of redefining the relationship between citizen and own state (absent migration). Before drawing broader conclusions it is worth analysing the substance of the rights doctrine more closely.³⁸

i) *The Ruiz Zambrano case law and the substance of the rights doctrine*

The case of *Ruiz Zambrano* has received extensive doctrinal attention;³⁹ it might be recalled that the case related to Colombian refugees attempting to establish a right of residence in Belgium by relying on the fact that their children were of Belgian nationality. The children had never moved and therefore fell, *prima facie*, outside the scope of the Treaty. Nonetheless, the Court accepted that Union citizenship conferred rights of residence and work to the third country national parents of Union citizens who had never exercised their free movement right. The Court found that such an extensive application of Union law was justified by the fact that otherwise the family would have to move outside of the Union territory, therefore rendering the children's citizenship rights of little use. In a much repeated quote the Court held that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the *genuine enjoyment of the substance of the rights* conferred by virtue of their status as citizens of the Union'.⁴⁰ Subsequent case law clarified that it is only in exceptional circumstances that the 'substance of the rights' doctrine might be relied upon by

³⁵ And in Case C-434/09 *McCarthy* [2011] I-3375 the Court has clarified that dual nationality alone is not enough to trigger the Treaty.

³⁶ Case C-135/08 *Rottmann* [2010] ECR I-1449; in this case though the claimant had moved from Austria to Germany, and had lost his Austrian nationality as a result of acquiring German citizenship, so the case had an important migration element even though the substance of it only concern one Member State. It is more doubtful whether any loss of nationality of a Member State would be treated as a matter of EU concern. For instance, in the UK removal of citizenship is becoming less exceptional and in 2013, twenty individuals were stripped of their British nationality; according to the data publicly available all those who lost their UK nationality also lost their EU citizenship since they had no other EU nationality; see www.parliament.uk/briefing-papers/sn06820.pdf; and see also <http://www.thebureauinvestigates.com/category/projects/deprivation-citizenship/?view=all>. On the applicability of the *Rottmann* doctrine to one such case see *GI (Sudan) v SSHD*, Court of Appeal Civil Division, [2012] EWCA Civ 867; [2013] 3 CMLR 36.

³⁷ Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

³⁸ See further M van der Brink's chapter in this same volume.

³⁹ E.g. D Kochenov 'The right to have what rights? EU citizenship in need of clarification' (2013) 19 ELJ 502; F Strumia 'Looking for Substance at the Boundaries: European Citizenship and Mutual Recognition of Belonging' (2013) 32 YEL 432; H van Eijken and SA de Vries 'A new route into the promised land? Being a European citizen after *Ruiz Zambrano*' (2011) 36 ELRev 704; A Lansbergen and N Miller 'European citizenship rights in internal situations: an ambiguous revolution' (2011) 7 ECL Rev 287; K Hailbronner and D Tym 'Annotation on *Ruiz Zambrano*' (2011) 48 CMLRev 1253.

⁴⁰ Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, para 42 emphasis added.

claimants against their own State. In *McCarthy*,⁴¹ Ms McCarthy – a dual British-Irish national living in the UK – attempted to rely on Union citizenship in order to establish the residence rights of her Jamaican husband. The Court restated the substance of the rights doctrine: it then found that the measures at stake would not have the effect of obliging Ms McCarthy to leave the territory of the EU; *indeed* she had an unconditional right of residence in the UK (but so had the *Ruiz Zambrano* children). Therefore, there was no factor to link Ms McCarthy's situation to one governed by European Union law and the case was declared to be purely internal to the United Kingdom. It should be noted that, given that Ms McCarthy was a recipient of welfare benefits and was not economically active her chance of being able to move to another Member State to enjoy her Union citizenship rights *and* her right to family life was negligible. Much as it was the case in *Ruiz Zambrano* then, had she wanted to live in the same country as her husband she would have had to follow him to Jamaica. This, however, played no part in the Court's reasoning.⁴² In *Dereci*,⁴³ the Court reached a similar conclusion in relation to the children of couples where only one of the parents was a third country national, further curtailing the significance of *Ruiz Zambrano*. It stated '(...) the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave the Union territory if such a right is not granted.'⁴⁴ Again, the fact that the child might want to follow her father outside the territory of the EU in order to maintain a meaningful relationship with him is not sufficient to affect the substance of her Union citizenship rights: only were she *obliged* to leave the EU would the Treaty be engaged.

The rulings in *McCarthy* and *Dereci* circumscribe the substance of the rights doctrine to the most exceptional circumstances, so that not any interference with the Union citizen's family rights is capable of engaging the Treaty. Rather, it is only when the citizen's alternative would be grossly disproportionate (such as was the case in *Ruiz Zambrano* where presumably the children would either have to follow their parents or be placed into care) that the Treaty is engaged in what would otherwise be a purely internal situation. Unfortunately, though, in the

⁴¹ Case C-434/09 *McCarthy* [2011] I-3375, para 56.

⁴² To be fair, the national court had simply enquired about the applicability of Directive 2004/38 to a own citizen who also had the nationality of another Member State and both the hearing and the Advocate General's Opinion pre-date the ruling in *Ruiz Zambrano* so that the likelihood of Mrs McCarthy's departure from the EU territory might not have been discussed.

⁴³ Case C-256/11 *Dereci et al.* [2011] ECR I-11315; for an annotation of the ruling particularly relevant to the overall theme of this book see S Adam and P Van Elsuwege 'Citizenship rights and the federal balance between the European Union and its Member States: Comment on *Dereci*' (2012) 37 ELRev 176. See also N Nic Shuibhne 'Annotation on *McCarthy* and *Dereci*' (2012) 49 CMLRev 349.

⁴⁴ *Dereci*, para 68; see also Case C-87/12 *Ymeraga*, judgment of 8 May 2013, nyr; for an interesting national case highlighting the difficulties in applying the *Zambrano/Dereci* case law see *People v Germany* (Case BVerwG 1 C 15.12), Federal Administrative Court, [2014] 2 CMLR 18; for a generous application of the *Zambrano* doctrine see *MA (Zambrano: EU Children outside EU: Iran)*, *Re* Also known as: *MA v Entry Clearance Officer, Istanbul SM v Entry Clearance Officer, Bangkok* (UK Upper Tribunal, Immigration and Asylum Chamber), [2013] UKUT 380 (IAC); and for a straightforward application of the *Dereci* doctrine see *Harrison v Secretary of State for Home Department* (SSHD); *AB (Morocco) v SSHD* also known as *DH (Jamaica) v SSHD*, Court of Appeal (UK) [2012] EWCA Civ 1736; [2013] 2 CMLR 23.

Court's assessment/test there is a significant speculative element: it is incredibly difficult, without allowing preconceptions about family structures and the nature of emotional ties to interfere with legal reasoning, to determine when a Union citizen child would have no real choice but to leave the territory of the EU. For instance, is it relevant in the Court's assessment which of the two parents is going to be deported? Will (and should) EU law have something to say about the primacy or otherwise of the maternal bond?

Secondly, with hindsight, the *Rottmann* and *Ruiz Zambrano* rulings together with the Court's refusal to overrule the latter in *Dereci*, seem to suggest that rather than being concerned about Union citizens, their status or the substance of their rights, the Court is preoccupied with maintaining its own hermeneutic prerogative. In other words, whilst *Ruiz Zambrano* and *Rottmann* might indeed be exceptional cases, the Court has ensured that it will have the ultimate say even in matters that appear to be, at first sight, purely internal,⁴⁵ since it will be for the Court to determine when the interference with the substance of citizenship rights might trigger the Treaty. Whilst there is nothing new about the fact that the CJ EU has (and should have) the power to determine the scope and meaning of Union law, the lack of a clear test to at least indicate roughly the external boundaries of the Treaty together with the inconsistencies in the case law and seemingly random application of the Treaty, especially in a field that affects so many citizens, is regrettable.

Thirdly, the open nature of the substance of rights test is deemed to become problematic: in this respect, the scholarship has struggled to define the 'substance' of Union citizenship rights since its inception: just consider the debates about the personal vis-à-vis material scope of application of the Union citizenship provisions or the debates about the link between Union citizenship and EU fundamental rights. So it is difficult to know which of the rights granted by the Treaty are, in the Court's opinion, the 'core' rights the limitation of which would trigger review. Is it the free movement rights only? The free movement *and* the residence rights? The free movement *or* the residence rights? And what about the right not to be discriminated against on grounds of nationality? Or the right to vote in the European Parliament elections?⁴⁶ And, crucially, even should the doctrine be limited to those cases in which the Union citizen would be forced to leave the territory of the EU, what is the standard of proof required?

In this respect the ruling in *Alokpa* is instructive:⁴⁷ this case related to the derived rights of residence (and work) of the mother of *migrant* Union minors. Ms Alokpa, a third country national living in Luxembourg, had twins with a Frenchman with whom she maintained no contact. Her children had French nationality by virtue of their father. Ms Alokpa applied for a

⁴⁵ For a critique of the *Rottmann* doctrine see *GI (Sudan) v SSHD*, Court of Appeal Civil Division, [2012] EWCA Civ 867; [2013] 3 CMLR 36, where the UK Court of Appeal raises the possibility of *Rottmann* being ultra vires.

⁴⁶ On the right to vote in the European Elections see Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, where the Court examined the rules concerning the election of the European Parliament, in a case confined to one Member State, having regard to Union citizenship and the principle of non-discrimination. On political rights see further F Fabrini, chapter X, in this same volume.

⁴⁷ Case C-86/12 *Alokpa*, judgment of 10 October 2013, nyr.

residence permit relying on the *Chen* case law:⁴⁸ she was the only carer of minor children, EU citizens residing in the territory of a Member State different from that of nationality. Whilst she did not have inherent resources (as Mrs Chen had) she had been offered a job of indefinite duration the only bar to taking which was the lack of a residence permit. Had she been granted the residence permit, she would have therefore been able to provide for her children who, in turn, would have been able to enjoy their Treaty rights to move and reside wherever they wanted in the EU. The denial of the residence permit was therefore affecting (in a direct and not speculative way) the substance of the children's citizenship rights. Moreover, the Court had been warned by its Advocate General and by the German Government of the risks of introducing a (further) form of hideous discrimination between those who have inherent resources (like Ms Chen) and those who have to earn their living (like Ms Alokpa). And yet, the Court found that Ms Alokpa could not rely on Directive 2004/38, or on her children's Union citizenship status, and the family was hence instructed to go back to the Member State of nationality. This was the case even though they had no link / family / friends in that State.⁴⁹

This interpretation deprives first generation Union citizen children of any meaningful right to move (unless rich) until that time when they are able to engage in an economic activity. It is very difficult then to understand how the substance of the rights doctrine can be taken seriously when rights expressly provided for by the Treaty are so curtailed: in other words, how is it that the (hypothetical) prospect of leaving the EU⁵⁰ affects the substance of the citizenship rights; but the denial of any possibility to reside in a State other than that of nationality leaves the substance of those same rights intact?

ii) *Supranational citizenship v national belonging*

If it is difficult to divine much about the scope of Union citizenship from the substance of the rights doctrine, there are some important trends emerging from the case law, not least the re-affirmation of the primacy of the national link of belonging over any notion of supranational citizenship.

In this respect consider that the end result in *Ruiz Zambrano* and in *Alokpa* alike is to vest the responsibility for the citizen firmly with the State of nationality; this is the case even when an individual assessment should have led the Court to recognise that the children in *Alokpa* had formed a real link with the host State and had no link whatsoever with the home State.⁵¹ In indicating that the children and their mother should go back to their state of nationality then,

⁴⁸ Case C-200/02 *Chen* [2004] ECR I-9925.

⁴⁹ In a case decided before the *Alokpa* ruling, the UK Upper Tribunal (Asylum and Immigration Chamber) faced with a very similar case (German citizens children, TCN mother living in the UK after having divorced the father who was also accused of domestic violence) and analysing the potential applicability of the *Ruiz Zambrano* doctrine to the facts before it, found that returning the applicants to Germany was not a 'realistic' prospect and that therefore the substance of rights doctrine might apply; see *Ahmed v Secretary of State for Home Department* [2013] UKUT 89 (IAC). The case would (or could) presumably be decided differently in light of *Alokpa*.

⁵⁰ And it should not be forgotten that in *Ruiz Zambrano* that was only a very theoretical prospect for two reasons: first of all, the non-refoulement clause rendered deportation to Columbia unlawful; secondly, by the time the case reached the CJ EU, Belgium had already granted the right to reside to the *Ruiz Zambrano* couple.

⁵¹ The children were born in Luxembourg and had been living there since; when the case was referred they had lived in Luxembourg for three years, and when the Court ruled they had been there for 5 years.

the Court is privileging an abstract notion of belonging, that allocated by birth,⁵² at the expenses of the supranational notion of belonging-by-choice so favoured in the earlier case law.⁵³ Similarly, in relation to the possibility to expel Union citizens from the host State's territory, the Court's more recent case law seems to indicate that, at the end of the day, ultimate responsibility for the errant Union citizen lies with the State of nationality rather than with the State which the citizen has elected as its own. For instance in *P.I.* the Court gave an extremely broad interpretation, difficult to reconcile with the aims of Directive 2004/38, of the 'imperative grounds of public security' which must be relied upon in order to expel a Union citizen who has lived in the host country for more than 10 years.⁵⁴ The Court found that any offence listed in Article 83(1) TFEU might constitute an 'imperative ground of public security'.⁵⁵ This is the case even though Directive 2004/38 makes no reference to those offences; that Article 83(1) lists those offences because of the potential for cross-border criminal activity which requires intra-EU co-operation (which is an entirely different issue from whether the involvement in one of these activities can be qualified as a threat to *imperative* grounds of public security); and that the pre-identification of crimes that might justify reliance on one of the derogations (be it public policy; serious grounds of public policy or imperative grounds of public security) seems at odds with the requirement that an expulsion measure be justified having regard to the actual conduct of the person concerned.⁵⁶

The case law on the public policy derogations is also instructive because the Court has recently imposed qualitative criteria in order to be able to enjoy the protection provided for in Directive 2004/38 (which is to say the Treaty protection). Here, it should be noted how in the first 30 or so years of case law, the Court very seldom accepted that a Member State could rely on the public policy derogation in order to expel a Union citizen (then worker or self-employed) from its territory.⁵⁷ The public policy derogation was narrowly construed to reflect the uniqueness of intra-Community migration, no longer to be left to the whim of the executive authorities: only in very exceptional circumstances, when the personal conduct of

⁵² This is now reflected in the approach of some national authorities; see e.g. in Belgium in 2013, 2712 EU citizens were refused a residence permit or/and asked to depart because they did not meet the sufficient resources and comprehensive health insurance criteria see <http://www.linkiesta.it/espulsione-cittadini-europei-belgio>; amongst those the case of Silvia Guerra who was an Italian citizen, street artist, who was expelled from Belgium notwithstanding the fact that she had been a worker and that her 8 year old son was in schooling (and had been for a while) in Belgium (see http://bologna.repubblica.it/cronaca/2013/12/23/news/silvia_l_artista_espulsa_dal_belgio_passer_il_natale_a_bologna-74361409/). This case had then been seized as an example of the gap between the EU and its citizens; see e.g. <http://www.beppegrillo.it/listeciviche/forum/2013/12/silvia-guerra-espulsa-da-bruxelles-belgio-perche-disoccupata.html>.

⁵³ See foundational citizenship cases mentioned in footnotes 12 and ff.

⁵⁴ Case C-348/09 *P.I.*, judgment of 22 May 2012, nyr; also compare this case with the slightly more balanced approach in Case C-145/09 *Tsakouridis* [2010] ECR I-11979; on these issues see D Kochenov and B Pirker 'Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, *P.I.* v. *Overbürgemeisterin der Stadt Remscheid*' [2013] 19 *Columbia Journal of European Law* 369; also available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266490.

⁵⁵ Those grounds are: terrorism; trafficking in human beings and sexual exploitation of women and children; illicit drug trafficking; illicit arms trafficking; money laundering; corruption; counterfeiting of means of payment; computer crime and organised crime.

⁵⁶ Already in Case 67/74 *Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297 the Court made clear that measures of a general preventative nature cannot be invoked to justify expulsion.

⁵⁷ A public policy derogation was successfully invoked in Case 41/74 *Van Duyn* [1975] ECR 1337, even though in the writer's opinion that was because the main focus of the case was on whether Directives could be directly effective. Perhaps surprisingly it is only post-citizenship that the Court more readily accepts the Member States' justifications, see e.g. Case C-33/07 *Jipa* [2008] ECR I-5157; Case C-145/09 *Tsakouridis* [2010] ECR I-11979; see also the cases discussed below.

the Union migrant could be qualified as a ‘genuine and sufficiently serious threat to the requirements of public policy affecting one of *the fundamental interests of society*’,⁵⁸ would the Member State be able to invoke successfully the public policy derogation. The mere breach of the criminal law was in this respect neither conclusive nor sufficient.

This case law was codified in full in Directive 2004/38,⁵⁹ which also provided for enhanced protection for permanent residents and those who have resided in the host country for more than ten years. The enhanced protection reflects the general assumption in the Directive that time alone is sufficient to create a genuine link between migrant and host community, so that even the misbehaving migrant might become the responsibility of the host State.⁶⁰ The right of permanent residence, in turn, is instrumental to strengthening the ‘feeling of Union citizenship’ and to ‘promoting social cohesion’.⁶¹ Since the entire point of Union migration law is to avoid, inasmuch as possible, executive discretion in the treatment of fellow Union citizens, the Directive does not include any requirement of ‘good conduct’ or any ‘integration test’: rights for Union citizens are simply incremental – the more time the citizen has spent in the host State the more rights she will derive. This notwithstanding, the Court has found that the acquisition of the right of permanent residence is not based on temporal and territorial factors alone: rather, it includes qualitative elements. The breach of criminal law might affect the integration requirement since it entails disregard for the fundamental values of the host society.⁶² Moreover, this also has repercussions, in the Court’s view, in relation to the possibility to benefit from the enhanced protection from expulsion, so that, *de facto*, a misbehaving Union citizen who has been subject to a custodial sentence will not be able, for that reason alone, to enjoy the enhanced protection provided for in the Directive.⁶³

The imposition of a qualitative criterion in order to benefit from the protection provided by the Directive (and by implication by the Treaty) is extremely problematic – and not merely because of its inconsistency with established hermeneutic principles on the interpretation of rights in EU law.⁶⁴ Here consider that by adding a qualitative criterion the Court is impacting on the personal scope of the citizenship provisions: in order to benefit from (at least some of) the rights detailed in the Directive the citizen has to be migrant; economically active or economically independent; *and* she must have been ‘good’. Furthermore, the idea that there are qualitative criteria that can be imposed on Union citizens leaves the door open to further qualifications: would for instance language skills be relevant in assessing the degree of

⁵⁸ Case 30/77 *Bouchereau* [1977] ECR 1999, para 35 emphasis added.

⁵⁹ Article 27(2) Directive 2004/38 which consistently with the case law also demands that the threat to public policy to be *present*.

⁶⁰ On this point see also Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paras 49 and 50. It should also be noted that 28(3)b which provides for the enhanced protection for citizens who have resided in the host Member State for more than 10 years does not specify (as Article 16(3) does) that such residence must have been legal, thus protection should arise as a recognition of the actual emotional and family ties, integration etc of the Union citizen.

⁶¹ Recital 17 Preamble Directive 2004/38.

⁶² Case C-378/12 *Onuekwere*, judgment of 16 January 2014, nyr.

⁶³ Case C-400/12 *M.G.*, judgment of 16 January 2014, nyr. I will not delve here on the absolute irrationality of this case law, where in order to gain enhanced protection from expulsion the citizen must have been ‘good’ when, obviously, a ‘good’ citizen would not be subject to expulsion in the first place; see further E Spaventa ‘Striving for Equality: who ‘deserves’ to be a Union Citizen?’ in *Scritti in Onore di Giuseppe Tesaurò*

⁶⁴ There are several examples of a restrictive and not textual interpretation (let aside teleological) of Directive 2004/38. Take for instance the fact that lawful residence for the purposes of the Directive excludes any residence which, even though lawful, was not carried out in line with the requirements contained in the Directive, e.g. Joined Cases C-424 and 425/10 *Ziolkowski and Szeja* [2011] ECR I-14035; on the other hand, and as explained further below, the interpretation of the rights of market citizens continues to be generous.

integration of the Union citizen? And generally, for which purposes is the integration of the Union citizen in the host society relevant? Is this not a way to bring back executive discretion in the treatment of Union citizens, therefore much reducing the significance of Union law?

3. *Earned citizenship*

After this brief excursion into what I called the reactionary phase of the case law, it is time to revisit our original question assessing the scope of Union citizenship, to finally relate out findings to the federal question which is at the centre of this book.

First of all, it is clear that a migratory element is still necessary for the citizen to be able to claim EU derived rights; in this respect, the *Ruiz Zambrano* doctrine is of marginal relevance when considered in the light of subsequent case law.

Secondly, and perhaps more surprisingly, being a migrant Union citizen is no longer enough: bar for the *Ruiz Zambrano* doctrine, the Union citizen also needs to satisfy the criteria listed in Directive 2004/38.⁶⁵ This reverses the previous *Baumbast* approach on its feet.⁶⁶ It might be recalled that in *Baumbast* the Court held that Article 21 TFEU was directly effective; for that reason the fact that Mr Baumbast did not satisfy the comprehensive health insurance criterion provided for in (then) Directive 90/364⁶⁷ was not conclusive. In order to determine whether it was legitimate for the United Kingdom to deny him a residence permit, hence negating a Treaty right, it was necessary to apply the general principles of Union law, and in particular the principle of proportionality. Only if the refusal of the residence permit was deemed to be proportionate would it be compatible with Union law. This, de facto, meant that the residency directives only formed the floor of rights available to Union citizens; the upper limit was determined directly through the application of the Treaty provisions.⁶⁸ Following the ruling in *Alokpa* this no longer seems true: if the economically inactive citizen does not satisfy the conditions provided for in Directive 2004/38, then she falls also outside the scope of Article 21 TFEU, without there being any need for the authorities to conduct a proportionality assessment. The Directive, at least as far as the scope of the Union citizenship provisions is concerned, then becomes floor and ceiling of rights – it is *the* standard; those oscillations that characterised the constituent phase of the case law, with its focus on the individual, are no longer there. And there is more – if the scope of Union citizenship is dependent upon satisfying the criteria contained in Directive 2004/38, then fundamental rights are also no longer applicable until when the claimant demonstrates that she has met, in full, those very requirements. It is no surprise then that in the cases analysed above there is no analysis of the impact of the State actions on the right to family life of the claimants.⁶⁹

⁶⁵ See also Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, judgment of 12 March 2014, nyr, where the Court finds that returning Union citizens derive a right of residence for their TCN spouses in the home state only insofar as the residence in the host state was genuine, meaning satisfying the conditions provided for in Article 7 Directive 2004/38. For an analysis of this ruling and the *S and G* ruling see E Spaventa forthcoming in CMLRev.

⁶⁶ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

⁶⁷ Directive 90/364 on the right of residence [1990] OJ L180/26, repealed by Directive 2004/38.

⁶⁸ On this point see M Dougan and E Spaventa 'Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC' (2003) ELRev 699.

⁶⁹ In *Dereci* the Court refers to fundamental rights as protected by the Convention, reminding the national court of its Convention obligations; in *McCarthy*, there is no mention to fundamental rights; the same is true of *Alokpa*, notwithstanding the fact that the national court had made explicit reference to fundamental rights in formulating its questions; bizarrely no reference to fundamental rights is to be found in the public policy cases either (*Onuekwere*; *M.G.*; *PI*). For a more optimistic take see S Iglesias Sánchez 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 ELJ 464.

Thirdly, and as mentioned above, migration, sufficient resources and comprehensive health insurance might still not be enough to trigger the EU protection: in at least some cases the citizen must also demonstrate to have integrated in the host society, for the time being by upholding a certain standard of behaviour, in the future who knows: the assessment of what it means to respect the values (whose values?) of the host society is potentially both subjective and inconsistent with the pluralism which should be at the core of a supranational citizenship.

The overall picture then might appear rather disarming: Union citizenship is for the wealthy, healthy and good Union citizens.⁷⁰ It has little to offer to those who cannot or will not migrate, thus increasing the sense of alienation from a project that continues to be the preserve of the few at the expenses (real or perceived) of the many; a project that is exclusive rather than inclusive in nature. It has nothing to offer to the disabled or those who have chronic illnesses since only the most privileged would be able to afford the comprehensive health insurance required by Directive 2004/38. It has nothing to offer to those who are marginalised, whose ability or potential to work is negligible, or who have alternative lifestyles, like many in the Roma community.⁷¹ In this way, the Union economically inactive migrant is only one step above the ‘alien’ and her rights have to be earned – through wealth, health and good behaviour. Whether such a qualified approach to Union citizenship amounts to anything much is then open to debate – in any event we are very far from the fundamental status so dear to the Court in its earlier case law.

4. Normative justifications and moral imperatives

We have shown above how the Court’s citizenship case law is going through a reactionary phase; this then begs two questions: first of all, can this more restrictive approach to Union citizenship be justified in normative terms? Secondly, and if the first answer is positive, what is the significance for the Union project of choosing one route (the reactionary route) over the other (the constituent approach). We shall look at these two issues in turn.

As pointed out above, the narrower interpretation of Union citizenship rights seem to point at recognising the centrality of the nationality link over any other status, so that Union citizenship has lost much of its innovative potential, being instead a minor addiction to the migrant’s individual armoury. In fact, given that the right to move and reside freely as economically independent individuals predates the introduction of Union citizenship, and that the Court no longer seems to require a proportionality assessment in relation to whether the citizen who does not meet the black letter criteria set out in Directive 2004/38 should nonetheless be granted a residence permit, there is very little that Union citizenship seem to be offering Union citizens. This said, in this author’s opinion, there is no obstacle in interpreting the Treaty citizenship provisions in such a narrow way. In the constituent wave of case law, the Court focussed on ‘citizenship’, trying to elaborate on what such a resonant concept might signify in a supranational context.

⁷⁰ And whilst not including the great majority of EU citizens managing to also exclude (and increase the sense of exclusion) of third country nationals; on these issues see D Acosta Arcarazo and J Martire ‘Trapped in the lobby: Europe’s revolving doors and the others as Xenos’ (2014) ELRev 362.

⁷¹ Here it is sufficient to recall the expulsion measures enacted by the Italian and French Governments as well as the rather ‘relaxed’ response by the European Commission to what, at first sight, seemed blatant violation of EU citizenship law. On the discrimination faced by the Roma communities see generally the European Roma Rights Centre, <http://www.errc.org/>; for a summary of the measures adopted at EU level as well as the link to all relevant documents see http://ec.europa.eu/justice/discrimination/roma/index_en.htm.

The reactionary phase, on the other hand, tallies more with the ‘additional’ nature of Union citizenship, as described in the Treaty. In other words, if Union citizenship is to be seen as a mere addition to national citizenship; and if it is for secondary legislation to determine the conditions for the exercise of citizenship rights, then the Court’s reactionary approach which restates the centrality of the national bond; and the centrality of secondary legislation in interpreting the rights of Union citizens is hermeneutically defensible. Moreover, the fact that the economic free movement provisions are still interpreted generously, and more generously than either suggested by legislation or desired by some of the Member States, is also entirely consistent with the Treaty premises. The economic free movement provisions are instrumental to achieving one of the main aims of the EU in a way that Union citizenship is not (yet). As a result, the existence of a clear discernible telos (economic integration) provide a solid basis for an expansive teleological interpretation; on the other hand, the telos in relation to Union citizenship is yet to be discerned: is it further integration? Or is it about creating a transnational status, where belonging can be chosen and not just inherited or earned? Is it about proceeding towards a more federal, integrated, state-like entity? Or rather, is it about recognising that the national bond remains paramount and is not, and should not, be threatened by European integration?

Unfortunately, and as noted by de Witte,⁷² the Court is not in the habit of elaborating on hermeneutic alternatives, so that we might get the impression (not uncommon in the continental tradition) that the interpretation chosen is the only possible one. And yet, and as demonstrated by the existence of different trends/phases in the case law, the path taken by the Court is one of many; and, therefore the Court’s choice reflects a given vision of what the European Union is (or should be). And with this choice, we might well disagree. In this respect, the reactionary phase with the return to market citizenship, reflects the limits of Union integration; in this vision, integration remains economic in nature; the European project helps those who can help themselves and solidarity is confined to those who have proven their market credentials. This vision might be shared by many a Member State and might be more sellable to the electorate, and yet it is not without problems. In particular, in an age where inequalities are increasing dramatically,⁷³ this approach fosters both exclusion and discrimination. Seemingly irrelevant criteria (e.g. whether you work on the other side of a border that the Union itself wants us to believe no longer exists) will determine the fate of claims that are of paramount importance to the individuals affected (e.g. whether the spouse will obtain a residence permit; or the extent to which fundamental rights apply). And, at the same time, enjoyment of a range of rights is made, for the economically inactive, conditional upon wealth, health, and good behaviour, socio-economic factors which are not (necessarily) within the control of the individual. The result of taking the reactionary path rather than the constituent path means to accept that the Union is not challenging established links; it is not enabling its citizens; it works to the advantage of the few excluding the many. The present writer would rather not see a citizenship at all, that see such exclusion and discrimination embedded in the European Union, not least since the link rights/economic status is becoming a prominent part of a certain political rhetoric which is only reinforced and legitimised by its reiteration on a grander scale at European level.

5. Conclusions

⁷² B De Witte ‘Democratic Adjudication in Europe: How Can the European Court of Justice be Responsive to its Citizens’ in M Dougan, N Nic Shuibhne and E Spaventa (eds) *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012), 129.

⁷³ See generally T Piketty *Capital in the XXIst Century* (Belknap Press 2014).

In another contribution to this volume, Nic Shuibhne looks at some of this same case law through a federalist lens; thus, she argues, from a federalist perspective the regressive phase makes perfect sense, even though from a citizenship perspective it might not. I am less generous with the Court for two main reasons. First of all, the Court has refused to overrule *Ruiz Zambrano* and *Rottmann*; what the Court is doing is to maintain a strong grip in policing the boundaries and decide upon the application of the Treaty in situations which were supposed to be reserved exclusively to the Member States, i.e. where the Treaty – and therefore the Court’s jurisdiction – should have not applied *at all*. In this respect, as argued above, it matters little that the threshold is so high as to make it very difficult for citizens to claim rights under these doctrines; from a federalist perspective the substance of the rights doctrine is a centralising not a federalist move. Secondly, if federalism, and the concern for maintaining national prerogatives in some spheres were to be the rationale underlying the case law, then it should underline *all* of the case law, not just the citizenship one. And yet, this is far from being the case: in the internal market cases, the Court continues to pursue a strong ‘market citizen’ agenda. This is true for cases such as *Vatsouras*, where the Court clearly disregards the legislative intention of excluding work-seekers from access to welfare benefits;⁷⁴ it is true of *S and G* where the Court reaffirms the *Carpenter* case law in relation to spouses of own citizens working or having businesses abroad;⁷⁵ it is true of *Brey* and of *Saint-Prix*; it is true of the case law concerning TCN parents of children exercising their education rights under Article 10 Regulation 492/2011⁷⁶ (education rights which are reserved to the children of economically active people). So if the case law on Union citizenship is reactionary, the case law on the ‘market citizen’ continues to be expansive, teleological and right-oriented. For this reason, it seems to me the federalist lens does not manage to capture the picture in its entirety, and might even distort it somewhat.

But if the citizenship case law cannot be explained through a federalist lens – what then? I have mentioned above that in my opinion the Court is reflecting a change in the political appetite for citizenship; and that recent case law indicates a shift in perception so that Union citizenship is now seen as a mere, and small, *addition* to national citizenship rather than a true supranational status. Interpreted in this way, Union citizenship loses much of its potential; and it does so at a moment where a clear vision of European integration is crucial in reassuring citizens that the EU is not only a rich-man’s club, where corporate and capitalist interests are served well and ordinary citizen are asked to foot the bill without having consumed (much of) the dinner. It is sufficient in this respect to recall the austerity programs imposed on many a EU citizen;⁷⁷ the cuts to the welfare budgets; the much reduced choice over alternative socio-economic models; the negotiation of international agreements away from any meaningful scrutiny; and all the other choices that are seen as increasingly distant from any democratic processes.

In the 70s the Court did not allow a major recession to sway it away from the integration ideals; it would be good if this Court were to remember that hard times do not necessarily

⁷⁴ Joined Cases C-22 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.

⁷⁵ Case C-457/12 *S v Minister voor Immigratie, Integratie en Aiel and Minister voor Immigratie, Integratie en Aiel v G*, judgment of 12 March 2014, nyr; see also Case C-456/12 *O v Minister voor Immigratie, Integratie en Aiel and Minister voor Immigratie, Integratie en Aiel v B*, judgment of 12 March 2014, nyr.

⁷⁶ Regulation 492/2011 on the freedom of movement for workers within the European Union [2011] OJ L 141/1 (Previously Article 12 Regulation 1612/68 (1968 OJ Sp Ed L 257/2, p 475).

⁷⁷ For a critique see M Blyth *Austerity – The History of a Dangerous Idea* (OUP 2013).

have to make bad laws. It is only by repositioning the citizen (any citizen) at the centre of the integration process that the latter can have any chance of succeeding.